United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1563

To be argued by
JOHN N. BUSH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1563

UNITED STATES OF AMERICA,

Appellee,

—v—

PAUL LAWRENCE ROSENRAUCH,
a/k/a LAWRENCE ROSEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN N. BUSH,
JOHN D. GORDAN III,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1563

UNITED STATES OF AMERICA,

Appellee,

—v—

PAUL LAWRENCE ROSENRAUCH, a/k/a LAWRENCE ROSEN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Paul Lawrence Rosenrauch (hereinafter "Rosen") appeals from a judgment of conviction entered on April 19, 1974 in the United States Distrct Court for the Southern District of New York after a five day trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 408, filed April 30, 1973, contained four counts. The first and the second charged Rosen with income tax evasion for the years 1966 and 1967, respectively; the third and fourth charged him with knowingly filing a false tax return in each of the same years. Rosen's trial began on February 25, 1974 and concluded on March 4, 1974 when the jury found him guilty as charged on all four counts.

On April 19, 1974, Judge Tyler sentenced Rosen to concurrent terms of 70 days imprisonment on Counts One and Two and concurrent terms of three years probation and fines of $2,500 on Count Three and on Count Four.

Rosen is enlarged on bail pending this appeal.

Statement of Facts

The Government's Case

A. Introduction.

The prosecution established that Rosen deliberately attempted to evade paying taxes on approximately one quarter of his taxable income in 1966 and roughly one half of his income in 1967.* The evasion for 1966 took the form of Rosen's failure to report on his tax return weekly payments of $100 which he received from the Progressive Drug Company ("Progressive"). In 1967, the evasion concerned in substantial part Rosen's failure to report payments of $250 per week which he received from a Canadian company called Intercontinental Hangers Ltd. ("Intercontinental").**

B. The Progressive payments.

Progressive was established a number of years before the events of this case as a wholesale drug company in the business of selling drugs and related products to retail drug stores in New York City. In the early 1960's, its longtime proprietor died, and two men, Henry Hainick and Lorence Press, entered into a contract with the estate of the deceased proprietor to buy the firm. Lacking sufficient resources to

---

* Rosen's reported income in 1966 was $15,600, and his unreported income was $4,600. In 1967, his reported income was again $15,600, and his unreported income was $11,611.06.

** The payments from Progressive carried over into early 1967 but only amounted to some $600 in that year.

fulfill the contract themselves, Hainick and Press asked Rosen to see if he could find financing for the proposed takeover. Rosen interested Martin and Sam Goldman, through a firm they controlled, and Joseph Abrams in investing in the venture, and by late 1965 the takeover was completed. While neither an officer or employee of the newly purchased firm, Rosen devoted part of his time to its affairs in the capacity of a financial adviser (9A-11A, 203A-207A, 227A-233A, 238A-239A).*

Shortly after the takeover, Rosen, together with the other new principals of Progressive, decided that they would each be paid $100 a week off the books from the cash proceeds of the firm. On February 4, 1966, the first payments were made. They were continued in the form of cash until December 2, 1966. To receive his share, Rosen in most instances sent his messenger, "Abe" or "Abie," to the premises of Progressive where he retrieved $200, one half intended for Rosen and one half for Joseph Abrams. Unknown to the recipients, Progressive's comptroller, Benjamin Goldfinger, recorded each payment that was made in a special notebook that he kept for this purpose (11A-15A, 208A-211A, 240A-244A; GX 15).

During the fall of 1966, outside accountants began an audit of Progressive's books and discovered the cash payments. Richard Bertoli, a financial advisor to Rosen, Abrams and the Goldmans, was told by the accountants of the payments and confronted Rosen with his newly gained knowledge. He told Rosen that the payments were "not being reflected on the books" (13A) and that if they were brought to light, it would appear the funds had been embezzled.

---

* Government exhibits are referred to as "GX —." Portions of the trial transcript have been reproduced in an appendix. References to that part of the transcript are denoted "— A;" references to the portions of the transcript not reproduced in the appendix are denoted "Tr. —."

Rosen brushed off Bertoli's fear that the payments would be publicized. When advised that Goldfinger had made a record of the payments, he still refused to have them reflected on Progressive's payroll because "he could not afford to have the withholding taken out" (13A, 11A-15).

Immediately thereafter, Bertoli brought the subject of the payments up at a meeting attended by Rosen, the Goldmans and several others. To avoid the specter of embezzlement charges, those at the meeting decided that all future payments would be made by check but that they need not be reported on their tax returns since the Government could never prove the money had not been spent for entertainment. In any event, the payments began to be made in the form of checks, with Rosen receiving a total of nine checks between December 2, 1966 and February 10, 1967, when the payments ultimately were stopped (16A-19A, 211A-213A, 244A-245A; GX 14 and 14a).

Until late 1966, the only record of the cash payments was that kept by Goldfinger in his notebook. Although by then the total sum expended in this fashion was $18,175, there was no good way to account for the sum on the company's books. Keeping with the idea previously expressed, the payments finally were written off, without substantiation of any sort, as travel and entertainment expenses and reported as such on the company's financial statements. This resolved the matter for the corporation (18A-19A, 240A-246A).

For Rosen, however, there was another hurdle—his income tax return for 1966. At Rosen's direction, Bertoli prepared a joint return for Rosen and his wife. In connection therewith, Bertoli told Rosen that the Progressive payments had to be reported as income. Indeed, he cautioned him that if they were not, he would refuse to sign Rosen's return as its preparer, which he had done in previous years. Rosen

rejected Bertoli's advice, and the return was submitted, unsigned by Bertoli, with no mention of the Progressive payments * (21A-26A, 28A-29A, GX 1, 9 and 9a).

---

* An incident which occurred after the 1966 return was filed was particularly revealing of Rosen's intent. In the spring of 1969, Rosen was faced with adverse newspaper publicity concerning his receipt of the Progressive payments, generated by an investigation into Progressive's affairs by the New York State Investigation Commission. Rosen tried to counter the image thus created in the eyes of certain S.E.C. officials by presenting them with a copy of a letter, never in fact mailed to the Commission, in which he said, *inter alia*, that he had reported the payments as income to him on his tax return (Tr. 22-26, 61A-69A, 143A; GX 8a). That letter read in pertinent part as follows:

> Paul Curran
> Chairman, State Investigation Commission
> 270 Broadway
> New York, N.Y.
> Gentlemen:
>
> According to the Wall Street Journal report, testimony was given at the hearings that clandestine payments were made by Progressive Drug, Inc., after its acquisition by Twentieth Century Industries, Inc., to several persons, including "Larry Rosen, an employee of Mr. Hanger, Inc., a Twentieth Century affiliate".
>
> * * * * *
>
> If we had been contacted in advance of the hearings, we would have been able to give the Commission the correct facts concerning our involvement with Progressive Drug, Inc., which facts are as follows:
>
> Sometime in 1965 Mr. Henry Henick (sic), an attorney whom I had known for 10 years, and a Mr. Lorence Press approached me to assist them in a purchase of stock of Progressive Drug Company, and offered a fee to me if I could arrange the needed financing. Over a period of approximately three to four months, after consultations with a number of finance companies, it was my opinion that Mr. Press and Mr. Henick (sic) did not have enough security to get the needed financing. They then asked me if I knew of any company with the proper assets which could purchase

[Footnote continued on following page]

C. The Intercontinental payments.

Throughout the period covered by the indictment, Rosen was the chief operating officer of a concern in the business of manfacturing plastic hangers known as Mr. Hanger, Inc. ("Mr. Hanger").* Intercontinental in turn was a wholly owned Canadian subsidiary of that company. As in the case of Progressive, Joseph Abrams was a major financial backer of Mr. Hanger; Richard Bertoli acted as the comptroller of the company (26A-28A).

In the spring of 1967, Rosen told Bertoli that he felt he was entitled to more money for the work he was doing for Mr. Hanger. He did not want to draw the money directly from Mr. Hanger, however, because he believed this would alarm the company's factor and upset Abrams. Bertoli told him that the money might be withdrawn through Intercontinental. To this suggestion, Rosen responded "Fine * * * I want to draw in the form of commissions or whatever you want to call it $250 a week" (28A). In addition, he told Bertoli to draw $150 a week himself from the same source. Two other officers of Mr. Hanger, Carl Birnbach and Benjamin Zuckerman, were also put on the payroll (27A-32A).

> Progressive. If so, they would take a commission and remain as managers, and I likewise would receive a finder's fee.
>
> * * * * *
>
> I received compensation for additional consulting work which was requested of me and I was given the right, by my associates at Mr. Hanger, to retain the income personally. This amounted to approximately $5,000 for services rendered from January 1966 to October 1967, which sum was reported on my tax return as additional income to me.
>
> * * * * *
>
> Lawrence Rosen

* This Court is already familiar with certain aspects of the affairs of Mr. Hanger, Inc. *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3596 (April 23, 1974).

Beginning March 4, 1967 and running through the remainder of the year, Rosen received a $250 check weekly from Intercontinental. By 1968 Rosen believed the affairs of Mr. Hanger to be sufficiently profitable to raise his payments from Intercontinental through several stages to $800 per week. Shortly thereafter, with the merger in the spring of 1968 of Mr. Hanger with another firm in the same field, the payments were stopped. Apart from the regular weekly payments he received from Intercontinental, Rosen also used that firm to pay a number of his personal expenses * (33A-39A, GX 12 and 12a).

During the time the Intercontinental payments were being made, the accounting records of Intercontinental were maintained by a firm of Canadian accountants. The payments to Rosen in those records were reflected as administrative salaries. When financial statements were finally prepared in late 1968 and 1969 for the period in question,** the characterization of these payments was changed, and they were called loans. This change was based principally on "loan confirmations" signed by the recipients of the payments, except for Bertoli,*** and by a letter from Rosen to the Canadian accountants, dated July 10, 1969 (GX 25), which confirmed this as being the proper accounting treatment (145A-158A, 172A-192A, GX 19, 19a, 20a, 22, 25, 27a, 29, 33).

---

* Intercontinental paid Rosen's home phone bill, his moving expenses from New York City to Connecticut and at least one installment on a personal bank loan (37A-38A).

** Intercontinental's fiscal year ended on January 31. Unaudited financial statements for the fiscal years ending January 31, 1966, 1967 and 1968 were prepared for the first time late in 1968. In the summer of 1969, an audited financial statement was completed for the January 31, 1968 fiscal year (150A-158A, 182A-185A).

*** Bertoli refused to sign the "loan confirmation" sent him because, as he told the Canadian accountants, the payments were not intended to be a loan and he had not treated them as such (120A-122A; GX 29).

The change in characterization took place, not suprisingly, after Rosen had filed his 1967 tax return failing to report the payments as income (GX 3). Except for a statement in the July 10, 1969 letter that the loan would be repaid sometime commencing in 1970, there was no agreement as to the term of the loan or the interest it would bear. A loan agreement was never signed. Rosen's purported loan, moreover, was not repaid in 1970 nor in 1971 or 1972 but only after the indictment below was filed and he was arraigned on it. Indeed, Rosen's intentions concerning the payments had been made quite clear in a conversation in the spring of 1968 when he told Bertoli he was not going to report the Intercontinental payments as income because as far as he was concerned "the payments will probably disappear" (122A-124A, 477A-479A, GX 25).

The Defendant's Case

A. The Progressive payments.

Rosen attempted to prove that all the moneys he received from Progressive were to compensate him for out of pocket travel and entertainment expenses he incurred while acting on behalf of Progressive. Towards this end, he called three witnesses who testified that they were aware of certain expenditures purportedly made by Rosen on behalf of Progressive.* Rosen also took the stand and asserted this to

* The testimony of each of these was severely weakened on cross-examination. For example, the first witness, Karl Grossman, the president of a commercial financing concern, testified on direct that he had spent time over many dinners paid for by Rosen discussing the business of Progressive. On cross-examination, it was established that Grossman's girlfriend was present at many if not most of these dinners and the nature of the discussions that had taken place lost their business character (268A-286A). To take a second example, Leon Stern stated on direct that Rosen had traveled with him and spent various sums in connection with introducing a certain line of candies as one of the products Progressive would distribute. It was brought out on

[Footnote continued on following page]

be the case (260A-268, 287A-294A, 302A-309A, 388A-404A, 422A-454A).

B. The Intercontinental payments.

For his defense with respect to the Intercontinental payments, Rosen sought to show that the payments were nothing more than loans and, hence, not income to him. He testified to this as did Benjamin Zuckerman, who was one of the recipients of the payments and a close friend of Rosen's. Zuckerman's credibility was shaken, however, when he admitted that on an earlier loan application he had called the Intercontinental payments commissions (412A-418A, 477A-479A, Tr. 395-413, GX 52).

ARGUMENT

The District Court properly excluded certain evidence proffered by Rosen.

Rosen complains of the trial judge's rejection as irrelevant of two lines of evidence that he offered at trial. First, Rosen attempted to introduce certain books and records of Mr. Hanger to prove that the $7,800 which he listed on his 1966 tax return (GX 1) as having been received by him from and spent on behalf of Mr. Hanger had actually not come from that firm. His attorneys then wanted to argue that if the money had not come from Mr. Hanger, it must have come from Progressive, in which event the payments

---

cross-examination, however, that one of the main places to which they had traveled was Los Angeles, where they conferred with, among others, a man who sold pizza boxes and mozzarella cheese and a man who sold paper products, fishing flies, rods and reels and inflatable furniture, hardly individuals in which a wholesale drug company doing business in New York City would have a compelling interest (309A-333A).

were "reported" on his return and there was no violation of law (334A-367A, Tr. 450-472).*

Second, Rosen proffered and the trial court excluded certain accounting statements prepared by Mr. Hanger. Having been prepared after the change in the accounting characterization of the Intercontinental payments from salaries to loans, the statements, as would be expected, reiterated the new characterization of the payments. These statements, Rosen now submits, were necessary to corroborate his testimony that those payments were not taxable to him (338A-357A).

Judge Tyler correctly excluded as irrelevant this evidence proffered by Rosen. Evidence is relevant if it has "'. . . any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'." *United States* v. *LaFroscia*, 485 F.2d 457, 459 (2d Cir. 1973). Even so, "[a] trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial." *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); *United States* v. *Kahn*, 472 F.2d 272, 279-280

---

* On appeal, Rosen also contends that this evidence would have impeached the credibility of the Government's witness Richard Bertoli. It is evident, however, that before a witness can be impeached, a basis for the impeachment attack must be laid. Aside from a passing remark that generally the information on Rosen's 1966 return and related documents had come from Mr. Hanger 23A-24A), Bertoli was never questioned on the origin of the $7,800. Nor was he ever shown or asked about any specific book or record of that company on that subject. Indeed, defense counsel were told on several occasions that they could recall Bertoli if they wished to lay the proper foundation to impeach him, but they never availed themselves of the opportunity (Tr. 397-399, 358A-366A). It is too late now for Rosen to argue that the disputed evidence should have been admitted for impeachment purposes.

and n.6 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).* An evidentiary ruling of this sort "'. . . depends upon the exercise of the sound discretion of the trial judge and will not be disturbed upon appeal except for grave abuse.'" *United States* v. *Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974).

As for the Progressive payments, Rosen's tax return for 1966 contains a statement of employee business expenses which sets out that he received $7,800 from Mr. Hanger to cover expenditures he made on behalf of that company. At the time he signed and mailed the return he also had a form 1099 information return which stated specifically that the $7,800 came from Mr. Hanger (21A-26A, GX 1 and 9a). Nevertheless, at trial Rosen sought to dump into evidence en masse the books and records of Mr. Hanger for the purpose of proving he did not receive such a sum from that firm in 1966 (334A-358A).

Even if the documents Rosen sought to introduce failed to record that he had received the $7,800 in "expense money" from Mr. Hanger listed on his 1966 return, this fact did not tend to show that the $7,800 figure included the $4,600 in Progressive payments, for which the admission of the documents was sought. The evidence, therefore, was not admissible without something beyond mere speculation by counsel that the Progressive payments might have been included in the $7,800 figure ascribed to Mr. Hanger. *United States* v. *Kahn*, *supra*, 472 F.2d at 279-280; *cf. Clark* v. *United States*, 211 F.2d 100, 105 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955). In fact, the inference Rosen wished to draw was one of the most improbable out of an almost infinite number available. By way of illustration, Rosen's 1966 return (GX 1) stated that the $7,800 had been spent for "[t]elephone" and "[u]se of home office & home entertaining," while the evidence regarding the purported use of the money received from Progressive sug-

---

* *See also* Proposed Rules of Evidence for United States Courts and Magistrates, Rule 403.

gested that it was for travel and entertainment expenses incurred at restaurants (260A-268A, 287A-294A, 302A-309A, 388A-404A, 422A-454A). If one wished to speculate, far more probable explanations for the alleged omission of the full $7,800 on Mr. Hanger's books and records would be either that the $7,800 was not reflected in the manner Rosen expected on those books and records or the figure may simply have been erroneously computed for Rosen's tax return. In sum, the inference for which Rosen claims he should have been allowed to put in this evidence was, as Judge Tyler properly characterized it, "one of the wildest inference possibilities I have ever heard of in my life" (359A) and "one of the more elaborate versions of the shell game" (351A) imaginable.

Assuming arguendo a minimal relevance to Rosen's evidence on this point, Judge Tyler was still well within the bounds of his discretion in refusing to admit the evidence. The evidence was, at best, a circuitous method of proving a fact most easily ascertained simply by asking Rosen or his tax preparer, Bertoli, a direct question on the matter at trial. Both men testified; neither were asked to clarify the issue.* Furthermore, the manner in which Rosen sought to present his contention would have required the diversion of the jury's attention from the real issue at trial—whether Rosen had received money from Progressive which was taxable as income to him—to the wholly irrelevant issue of the preparation, maintenance and accuracy of Mr. Hanger's books. Under the circumstances, Judge Tyler, who made a careful examination of the evidence before ruling,**

---

* Judge Tyler offered defense counsel the opportunity to recall Bertoli for examination concerning the source for the $7,800 figure listed on the tax return (358A-366A). Defense counsel never did.

** Before making his ruling, Judge Tyler let Rosen's expert testify at length on the theory pressed on appeal (Tr. 450-472). Only after hearing this testimony did the judge rule on the admissibility of the evidence now in question.

was justified in rejecting the evidence not only as irrelevant but as designed to unduly confuse issues and waste time at trial. See *United States* v. *Kahn*, *supra*, 472 F.2d at 279-280 and n. 6; *United States* v. *Bowe*, *supra*, 360 F.2d at 15.*

With respect to the accounting statements prepared by Mr. Hanger, the story is much the same. The accounting statements in question were all prepared after the change in accounting treatment of the Intercontinental payments had been made on Intercontinental's books and after Rosen's tax return had been filed. They were not statements of Intercontinental, the company directly in question whose financial statements had already been introduced into evidence, but of its parent company (338A-357A). They were, as a result, both remote in time and in authorship from "any fact that . . . [was] of consequence to the determination of the action." *Cf. Wolfe* v. *United States*, 261 F.2d 158, 161 (6th Cir. 1958). But, even if deemed to be marginally relevant, they were properly excluded as being merely cumulative of substantially better evidence.

---

* Because evidentiary questions are basically unique to each case, an extended discussion of the cases cited by defendant is not necessary. Of the four cases most heavily relied on by him, two, *United States* v. *Klock*, 210 F.2d 217 (2d Cir. 1954) and *United States* v. *Peach Mountain Coal Min. Co.*, 161 F.2d 476 (2d Cir. 1947), involved situations where the trial court misinterpreted the law and, hence, could not properly judge the questioned evidence's relevancy. In the other two, *United States* v. *Wertheimer*, 434 F.2d 1004 (2d Cir. 1970) and *United States* v. *Dunn*, 299 F.2d 548 (6th Cir. 1962), the defendants were stopped from presenting evidence on collateral issues opened up by the Government. As is clear from the foregoing, none of the factors which influenced the courts in these four cases are present here.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN N. BUSH,
JOHN D. GORDAN III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1974—614—240 / 387—74

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Patricia A. Dorsett being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of July 74
he served a copy of the within Affidavit
by placing the same in a properly postpaid franked envelope addressed: Amar, Wasman & Bullard
17 E. 63rd St - N.Y.C. 10021
Wagman, Cannon & Masoff.
136 E. 57th St., 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Patricia A Dorsett

Sworn to before me this
25th day of July, 1974

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
~~Certificate filed in New York County~~
Commission Expires March 30, 1976